No. 91-7358

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In the Supreme Court of the United States

OCTOBER TERM, 1992

TODD A. BRECHT, PETITIONER

v.

GORDON A. ABRAHAMSON, SUPERINTENDENT,
DODGE CORRECTIONAL INSTITUTION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a violation of the holding of *Doyle* v. *Ohio*, 426 U.S. 610 (1976), which bars the government's use for impeachment purposes of a defendant's silence after receiving *Miranda* warnings, requires a federal habeas court to overturn a state conviction even if the error did not have a substantial influence on the outcome of the trial.

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INTEREST OF THE UNITED STATES

This case concerns the standard a federal court should apply in deciding whether to overturn a conviction when it discovers on collateral review that the prosecutor at trial violated the holding of *Doyle* v. *Ohio*, 426 U.S. 610 (1976). Resolution of that question requires assessment of the proper balance between federal habeas jurisdiction and the finality of state determinations. The Court's analysis of that question is likely to affect the disposition of similar claims for collateral relief by federal prisoners under 23 U.S.C. 2255. The United States in the past has participated in significant cases raising claims re-

garding the application of harmless error analysis, see *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991); *Rose* v. *Clark*, 478 U.S. 570 (1986), and the scope of review of state criminal convictions on habeas corpus, see, *e.g.*, *Withrow* v. *Williams*, No. 91-1030 (set for argument Nov. 3, 1992); *Sawyer* v. *Whitley*, 112 S. Ct. 2514 (1992); *Wright* v. *West*, 112 S. Ct. 2482 (1992); *Murray* v. *Carrier*, 477 U.S. 478 (1986); *Reed* v. *Ross*, 468 U.S. 1 (1984); *Engle* v. *Isaac*, 456 U.S. 107 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

STATEMENT

1. Petitioner was incarcerated in Georgia state prison following his conviction for felony theft when his sister Molly Hartman paid the restitution for his crime and accepted temporary custody of him in Alma, Wisconsin. Molly was married to Roger Hartman, the district attorney for Buffalo County, Wisconsin. The Hartmans told petitioner, who was a heavy drinker and a homosexual, that he was not to drink alcohol or engage in homosexual activity while he remained at their home. Pet. App. 3a, 3b, 3c, 2d.

On October 17, 1985, no more than a week after petitioner moved in with the Hartmans, petitioner drank liquor and beer in their home and, having found a rifle in their gun cabinet, began shooting tin cans in their back yard. When Roger returned home, petitioner shot him in the back and fled in Molly's car. Because petitioner had taken the receiver of the upstairs telephone off the hook, the downstairs telephone was inoperable. Hartman crawled to a neighbor's house for help, where he told the neighbor and a police officer who arrived with paramedics that petitioner had shot him. Pet. App. 3a, 3b-4b, 3c-4c, 2d.

Petitioner's initial flight ended after he wrecked the car by driving it into a ditch. When a police officer stopped to inquire, petitioner falsely stated that Molly Hartman knew about the wreck and had called a tow truck. Petitioner then hitched a ride to Minnesota, where police stopped him in a shopping center. At first he lied about his identity, but when the police identified him they arrested him for the shooting of Hartman. Pet. App. 3a, 4b, 3c-4c, 2d.

2. Hartman died of the injuries sustained in the shooting, and the State of Wisconsin indicted petitioner for first-degree murder. At trial, petitioner testified in his own defense. He admitted shooting Hartman but claimed that the rifle had discharged by accident. Petitioner testified that Hartman's return had surprised him, that he did not want Hartman to see him with a rifle, and that the rifle fired when he tripped as he rushed upstairs to return it to the room from which he had taken it. Petitioner claimed that he yelled to Hartman and tried to find him to offer him aid, but that Hartman had disappeared. Petitioner stated that he then took Mrs. Hartman's car to look for Mr. Hartman and that when he spotted Mr. Hartman at the neighbor's door he panicked and drove away. Pet. App. 3a, 3b, 3c, 2d.

To rebut petitioner's defense, the prosecution called the coroner, who testified that the bullet had entered Hartman's upper body on a horizontal to slightly downward trajectory, a path inconsistent with a claim that the weapon had discharged while petitioner was falling. The prosecution also introduced evidence

that the rifle was found outside the house (where Hartman was shot), not inside by the stairs, and that a live round was jammed in the chamber (suggesting that petitioner had tried to fire another shot). The prosecution offered a motive for the killing: petitioner's hostility to Hartman because of the latter's objection to petitioner's homosexuality and to its practice in the Hartmans' home. The prosecution pointed out petitioner's failure to get help for Roger, his flight, his lies to the police, and his failure to mention anything about an accidental shooting to the officer who found him in the ditch, the man with whom he later hitched a ride, or the officers who arrested him at the shopping center. In addition, over defense counsel's objections, the prosecutor referred generally to petitioner's failure to offer his explanation before trial, thus implicitly referring to petitioner's silence between the time of arraignment (when petitioner received his *Miranda* warnings) and the time of trial.[1] The jury convicted petitioner

[1] The prosecutor twice asked petitioner whether he had told anyone at any time before trial that the shooting was accidental. See Pet. App. 5c (prosecutor's question on cross-examination: "In fact the first time you have ever told this story is when you testified here today was it not?"); *ibid.* (prosecutor's question on recross-examination: "Did you tell anyone about what happened in Alma?"). The prosecutor made three references to this point in his closing statement. See *ibid.* ("[R]emember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence."); *ibid.* ("[H]e made no statements to the law enforcement officers."); *ibid.* ("I know what I'd say, I'd say 'hold on, this was a mistake, this was an accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story.").

of murder, and he was sentenced to life imprisonment. Pet. App. 3a-5a, 4b, 4c-6c, 3d.

3. The Court of Appeals of Wisconsin reversed. Pet. App. 1a-7a. The court first held that the prosecutor's use of petitioner's pre-arrest silence was permissible under this Court's decision in *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). Pet. App. 4a. Second, acknowledging that the federal Constitution permitted the use of his post-arrest, pre-*Miranda* silence, see *Fletcher* v. *Weir*, 455 U.S. 603 (1982), the court held that the trial court violated the Wisconsin Constitution by allowing use of such evidence at trial, and that the error was not harmless. Pet. App. 4a-5a. Finally, the court held that use of petitioner's post-*Miranda* silence violated the Due Process Clause and was sufficiently prejudicial to justify reversal. *Id.* at 5a-6a.

4. The Supreme Court of Wisconsin reversed and reinstated the conviction. Pet. App. 1b-11b. The court agreed with the court of appeals that use of the pre-arrest silence was permissible, *id.* at 6b-7b, but reversed the court of appeals' holding that the Wisconsin Constitution forbade use of petitioner's post-arrest, pre-*Miranda* silence, *id.* at 7b-8b. Finally, the court agreed that the use of petitioner's post-*Miranda* silence violated *Doyle* v. *Ohio*, 426 U.S. 610 (1976), Pet. App. 8b-9b, but concluded that the error "was harmless beyond a reasonable doubt," *id.* at 9b (quoting *Chapman* v. *California*, 386 U.S. 18, 24 (1967)). The court explained that the "improper references to [petitioner's] silence were infrequent," consuming "less than two pages of a 900-page transcript, or a few minutes in a four day trial in which

twenty-five witnesses testified,"[2] and that the prosecution's case against petitioner was quite strong even without the improper references. Pet. App. 9b.

5. Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Wisconsin. The court granted relief. Pet. App. 1c-11c. The court agreed with the Supreme Court of Wisconsin that the only objectionable use of petitioner's silence was the use of petitioner's post-*Miranda* silence (*id.* at 7c-8c), but disagreed with the state supreme court's conclusion that the use of that evidence was harmless beyond a reasonable doubt (*id.* at 8c-9c). The district court stated that a constitutional error in that context could be considered harmless only if the remaining evidence of guilt was "overwhelming." *Id.* at 9c. Because the court did not believe the evidence was "overwhelming," it concluded that overturning the conviction was appropriate. *Ibid.*

6. The Seventh Circuit reversed. Pet. App. 1d-15d. That court agreed that the use of petitioner's post-*Miranda* silence violated *Doyle*, but concluded that the error was not sufficiently prejudicial to justify overturning petitioner's conviction. The court concluded that it is inappropriate to reverse a state-court conviction on habeas corpus because of a *Doyle* error solely because the court cannot determine that the error was harmless beyond a reasonable doubt. Instead, the court reasoned, such convictions should

[2] The court noted that the state court of appeals' contrary conclusion rested at least in part on its view that the trial court erred not only in allowing the minimal reference to the post-*Miranda* silence, but also in allowing the additional references to the pre-*Miranda* silence. Pet. App. 9b.

be overturned only if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 12d (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). The court explained that the delays associated with collateral review followed by retrial "mak[e] it substantially more costly" to enforce *Doyle* on collateral attack than to enforce it on direct appeal, Pet. App. 11d, and pointed out that either standard would "infor[m] prosecutors that an effort to draw the jury's attention to the defendant's silence reduces the chance of conviction, and tells trial judges how to respond to the prosecutors' efforts." *Id.* at 12d. Accordingly, the court concluded that the balance of the costs and benefits supported applying the more lenient *Kotteakos* standard. *Id.* at 12d-14d.

Finally, observing that petitioner did not contend that the references to his post-*Miranda* silence had a substantial and injurious effect or influence on the trial, "and could not do so with a straight face, given the many more, and entirely proper, references to his silence preceding arraignment," the court held that the *Doyle* error would not support a writ of habeas corpus. Pet. App. 14d.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Doyle* v. *Ohio*, 426 U.S. 610 (1976), this Court held that it deprives a criminal defendant of due process for the government to introduce evidence at trial that the defendant remained silent after receiv-

[3] Judge Cudahy concurred in the judgment, reasoning that the *Chapman* standard was applicable to *Doyle* errors even on collateral review, but that the alleged error in this case was harmless even under that standard. Pet. App. 14d-15d.

ing the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). This case requires the Court to consider when a conviction should be overturned on collateral review on the basis of a violation of *Doyle*. Our analysis proceeds in two steps. First, violations of *Doyle* are not so inherently prejudicial as to justify automatic reversal in all cases. Second, when a *Doyle* error is considered on collateral review, the conviction should not be overturned unless the error had a substantial and injurious effect on the outcome of the case.[4]

A. This Court explained in *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991), that automatic reversal is not required for constitutional errors that occur "during the presentation of the case to the jury, and * * * may therefore be quantitatively assessed in the context of other evidence." *Id.* at 1264. Because *Doyle* errors are errors of that class, an appellate court is able to ascertain whether the error had any effect on the outcome of the trial. Accordingly, appellate courts need not automatically reverse all convictions involving a violation of *Doyle*.

B. In determining whether a *Doyle* error is sufficiently prejudicial to justify overturning a state-court conviction on habeas corpus, a federal court must take account of the important role that the States' separate adjudicatory processes play in our federal system, as well as the limited role that exists for collateral review in light of society's interest in the finality of criminal convictions. This Court has recognized

[4] The Court granted review in *Greer* v. *Miller*, 483 U.S. 756 (1987), to decide the question presented here, see *id.* at 761 n.3, but did not reach the question, because the Court concluded that *Doyle* had not been violated at all, *id.* at 764-767.

that those interests justify several important differences between the role of courts reviewing criminal convictions on direct appeal and the role of federal courts evaluating habeas corpus petitions filed by state prisoners.

Those interests are also pertinent in assessing the standard of review to determine whether an error is sufficiently prejudicial to justify overturning a state-court conviction on habeas corpus. The benefits of overturning a conviction on collateral review are significantly less than those on direct appeal, because the delay lessens the deterrent force of the federal rule. On the other hand, the costs of overturning a conviction on collateral review are significantly higher than the costs on direct appeal, because the lengthy delay makes retrial more difficult. Moreover, when the conviction is overturned on the basis of an error that did not substantially influence the outcome of the trial, the result justifiably undermines the public's confidence in the judicial process.

Those problems are particularly serious in cases like this one, where the alleged error does not infringe a rule designed to further the truth-seeking functions of the trial. Because a violation of *Doyle* results only in the admission of truthful evidence, the *Doyle* rule does not increase the accuracy of the judicial process. The factfinder at trial is fully capable of evaluating the evidence and determining whether it has significant probative force. Accordingly, whatever the rule with respect to other constitutional violations, the relevant balance of interests indicates that federal courts should not overturn a state-court conviction on habeas corpus because of a *Doyle* error unless the error "had substantial and injurious effect

or influence in determining the [outcome of the case]," *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946).

ARGUMENT

A FEDERAL HABEAS COURT SHOULD NOT OVERTURN A STATE CONVICTION BECAUSE OF AN IMPROPER REFERENCE TO THE DEFENDANT'S SILENCE AFTER RECEIVING *MIRANDA* WARNINGS UNLESS THE REFERENCE HAD A SUBSTANTIAL AND INJURIOUS EFFECT ON THE OUTCOME OF THE CASE

A. A Violation of *Doyle* Does Not Justify Automatic Reversal of a Conviction

This Court has never decided whether a violation of *Doyle* requires automatic reversal of a conviction.[5] As the Court recently explained, however, "[s]ince this Court's landmark decision in *Chapman* v. *California*, [386 U.S. 18 (1967)], * * * the Court has applied harmless error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1263 (1991). The basis for the broad application of the harmless-error doctrine is obvious:

> [T]he harmless-error doctrine is essential to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."

Id. at 1264 (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986)); see also 28 U.S.C. 2111 (directing courts, on hearing any appeal or writ of certiorari, to give judgment after examining the record "without regard to errors or defects which do not affect the substantial rights of the parties"); Fed. R. Crim. P. 52(a) (directing courts to disregard "[a]ny error, defect, irregularity or variance which does not affect substantial rights").

The *Fulminante* Court also set forth the "common thread connecting" the cases in which it was determined that a particular type of constitutional error did not require automatic reversal: "[E]ach involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine [the effect the error had on the trial]." 111 S. Ct. at 1264. The other side of the coin—errors that require automatic reversal—comprises "structural defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." 111 S. Ct. at 1256.[6] As the Court explained, structural

[5] In *Doyle* itself, the State did not claim that the error might have been harmless. 426 U.S. at 619-620. Similarly, in *Wainwright* v. *Greenfield*, 474 U.S. 284 (1986), in which the Court found a *Doyle* violation where the prosecutor used the defendant's post-arrest, post-*Miranda* silence to rebut his insanity defense, the State did not contest the lower court's conclusion that the alleged error was prejudicial. *Id.* at 295 n.13.

[6] The Court noted several examples, namely, total deprivation of the right to counsel at trial, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), trial before a partial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927), unlawful exclusion of members of the defendant's race from a grand jury, see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), deprivation of the right to self-representation, see *McKaskle* v. *Wiggins*, 465 U.S. 168, 177-

defects result in automatic reversal because they affect "[t]he entire conduct of the trial from beginning to end," and thus "defy analysis by 'harmless-error' standards." *Ibid.*

Under that framework, a violation of *Doyle* is not sufficient to justify automatic reversal.[7] Such an error will not have any overarching effect on the entire trial process; rather, its effect is limited to putting before the jury a particular type of improper evidence. Courts are as capable of evaluating the probability that the improper evidence had an effect on the outcome of the case here as they are in similar areas where the harmless-error doctrine has been found applicable. See, *e.g.*, *United States* v. *Hasting*, 461 U.S. 499, 507-512 (1983) (applying harmless-error analysis to a comment on a defendant's failure to testify at trial[8]); *Chapman* v. *California*, 386 U.S.

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178 n.8 (1984), and deprivation of the right to a public trial, see *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984).

[7] The courts of appeals uniformly have held that *Doyle* error is subject to harmless-error analysis. See, *e.g.*, *United States* v. *Elkins*, 774 F.2d 530, 538-540 (1st Cir. 1985); *Leecan* v. *Lopes*, 893 F.2d 1434, 1442 (2d Cir.), cert. denied, 496 U.S. 929 (1990); *United States* v. *Cummiskey*, 728 F.2d 200, 204, aff'd after remand, 745 F.2d 278 (3d Cir. 1984), cert. denied, 471 U.S. 1005 (1985); *Williams* v. *Zahradnick*, 632 F.2d 353, 360-365 (4th Cir. 1980); *United States* v. *Blankenship*, 746 F.2d 233, 238 (5th Cir. 1984); *Martin* v. *Foltz*, 773 F.2d 711, 715 (6th Cir. 1985), cert. denied, 478 U.S. 1021 (1986); *Bass* v. *Nix*, 909 F.2d 297, 304-305 (8th Cir. 1990); *United States* v. *Newman*, 943 F.2d 1155, 1158 (9th Cir. 1991); *United States* v. *Pino*, 827 F.2d 1429, 1432-1433 (10th Cir. 1987); *United States* v. *Rivera*, 944 F.2d 1563, 1569-1570 (11th Cir. 1991).

[8] The Court held in *Griffin* v. *California*, 380 U.S. 609, 613-615 (1965), that such a comment violated the Self-Incrimination Clause of the Fifth Amendment.

at 22-26 (same); *Fulminante*, 111 S. Ct. at 1266 (applying harmless-error analysis to admission of an involuntary confession). Thus, a violation of *Doyle* should not result in automatic reversal of a conviction.

B. A *Doyle* Error Is a Basis for Reversal on Collateral Review Only If It Has a Substantial and Injurious Effect on the Outcome

1. "The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights." *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982). Accordingly, "[n]owhere has a 'proper respect for state functions' been more essential to our federal system than in the administration of criminal justice." *Rose* v. *Mitchell*, 443 U.S. 545, 585 (1979) (Powell, J., concurring in judgment) (quoting *Younger* v. *Harris*, 401 U.S. 37, 44 (1971)). Similarly, the tendency of federal habeas review to "frustrat[e] both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *Murray* v. *Carrier*, 477 U.S. 478, 487 (1986) (internal quotation marks omitted), has led to a limited role for federal courts evaluating habeas corpus petitions filed by persons convicted of crimes in state courts. See *Engle* v. *Isaac*, 456 U.S. at 127 ("Liberal allowance of the writ * * * degrades the prominence of the trial itself."); *Duckworth* v. *Eagan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring); *Harris* v. *Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting) ("[F]ederal habeas review * * * intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.").

Furthermore, the interest in finality reflected in the "basic distinction between direct review and col-

lateral review," *United States* v. *Frady*, 456 U.S. 152, 165 (1982), has led to a limited role for federal courts in considering collateral attacks on criminal convictions, even with respect to federal convictions. See *McCleskey* v. *Zant*, 111 S. Ct. 1454, 1468 (1991) ("Neither innocence nor just punishment can be vindicated until the final judgment is known."); *Frady*, 456 U.S. at 164-165 ("Once the defendant's chance to appeal has been waived or exhausted, * * * we are entitled to presume he stands fairly and finally convicted."); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.13 (1977); *Mackey* v. *United States*, 401 U.S. 667, 682-683 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

Hence, "the notion that different standards should apply on direct and collateral review runs throughout [the Court's] recent habeas jurisprudence." *Wright* v. *West*, 112 S. Ct. 2482, 2490 (1992) (separate opinion of Thomas, J.) (citing *Greer* v. *Miller*, 483 U.S. 756, 768-769 (1987) (Stevens, J., concurring in judgment)); see *Duckworth* v. *Eagan*, 492 U.S. at 212-213 (O'Connor, J., concurring). For example, some types of issues are not cognizable on federal habeas review at all, so long as the State affords a full and fair opportunity for litigation in its courts. See *Stone* v. *Powell*, 428 U.S. 465, 489-496 (1976). Similarly, other types of claims are cognizable only if they rest on doctrines that existed before the judgment became final. See *Teague* v. *Lane*, 489 U.S. 288, 305-310 (1989) (plurality opinion of O'Connor, J.).

2. Those same "considerations of finality," *Duckworth*, 492 U.S. at 213 (O'Connor, J., concurring), are pertinent in determining what standard a federal habeas court should apply in considering whether to overturn a state conviction on collateral review. Title

28 requires a federal court to dispose of a petition for a writ of habeas corpus "as law and justice require." 28 U.S.C. 2243. Accordingly, the Court should formulate rules in this area—as it has in other areas of habeas corpus procedure—"through a sensitive weighing of the interests implicated by federal habeas corpus adjudication of constitutional claims determined adversely to the prisoner by the state courts." *Kuhlmann* v. *Wilson*, 477 U.S. 436, 448 (1986) (plurality opinion of Powell, J.); see *Stone* v. *Powell*, 428 U.S. at 489-492.

The benefits of overturning a conviction on collateral review because of an error that had no substantial effect on the trial are nugatory. Whatever the standard on collateral review, prosecutors will have a significant incentive "to toe the constitutional mark," *Teague*, 489 U.S. at 307 (plurality opinion of O'Connor, J.), because a constitutional violation will be a basis for overturning the verdict on direct appeal unless the prosecutor can show that the violation was "harmless beyond a reasonable doubt," *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Moreover, if federal courts continue to overturn convictions on collateral review whenever the error "had substantial and injurious effect or influence in determining the jury's verdict," *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946), the possibility of collateral review would continue to have a significant deterrent effect in any case where the violation would give the prosecutor a substantial benefit at trial.

On the other hand, this Court repeatedly has emphasized the costs to the justice system of overturning a conviction on collateral review. First, the be-

lated retrials that result from reversals on collateral review seriously undermine the capacity of the judicial system to discern the truth. "Witnesses die or move away; physical evidence is lost; memories fade." *Vasquez* v. *Hillery*, 474 U.S. 254, 280 (1986) (Powell, J., dissenting).[9] Moreover, and perhaps most unfortunately, a willingness to overturn final criminal convictions based on errors that did not have a substantial effect on the outcome of the trial undermines public respect for the justice system. Such a devil-take-the-hindmost demand for perfection in state criminal trials thus robs the judicial process of legitimacy by "cast[ing] the criminal system as a game and send[ing] the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns." *Duckworth*, 495 U.S. at 212 (O'Connor, J., concurring).

3. In light of those considerations, federal habeas courts should not overturn state convictions based on *Doyle* errors unless the error had a substantial influence on the outcome of the trial. See *Greer* v. *Miller*, 483

[9] See *Zant*, 111 S. Ct. at 1468 ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time • • • prejudice the government and diminish the chances of a reliable criminal adjudication.") (internal citation and quotation marks omitted); *Duckworth*, 492 U.S. at 211 (O'Connor, J., concurring); *Engle* v. *Isaac*, 456 U.S. at 127-128 ("Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible [and thus] reward the accused with complete freedom from prosecution."); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 147 (1970) (noting that in many cases the right to retry the defendant will exist as "a matter of theory only").

U.S. 756, 768-769 (1987) (Stevens, J., concurring in judgment) ("[I]n typical collateral attacks, such as today's, *Doyle* errors are not so fundamentally unfair that convictions must be reversed whenever the State cannot bear the heavy burden of proving that the error was harmless beyond a reasonable doubt.") (emphasis omitted). A violation of *Doyle*, unlike some other constitutional errors, does not undermine the truthseeking purpose of the trial, because it results in nothing more prejudicial than the admission of truthful evidence regarding the defendant's silence. As this Court has recognized, there are many circumstances in which evidence of a defendant's silence is genuinely probative of relevant issues. Hence, the "[c]ommon law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." *Jenkins* v. *Anderson*, 447 U.S. 231, 239 (1980). If the defendant can produce evidence (such as his own testimony) that he remained silent not because he had not yet fabricated an exculpatory explanation, but instead in reliance on the *Miranda* warnings, he is free to present that evidence at trial. It may be that the defendant's silence in such a case will be ambiguous, but the factfinder should be just as competent to evaluate the opposing evidence and draw appropriate inferences as it is to resolve any of the other fact issues placed before it in criminal cases.[10] In sum,

[10] To be sure, the Court in *Doyle* suggested that a defendant's silence is "*insolubly* ambiguous." 426 U.S. at 617 (emphasis added); see *United States* v. *Hale*, 422 U.S. 171, 180 (1975) (suggesting that "evidence of silence at the time of arrest generally [is] not very probative of a defendant's credibility"). But the *Doyle* Court made it clear that its decision

Doyle does not further the truthseeking purpose of a trial because it deprives the factfinder of truthful evidence.

Accordingly, the "substantial influence" standard adopted by the court of appeals better reflects the relevant interests than the "beyond a reasonable doubt" standard *Chapman* articulated for cases on direct appeal. The "substantial influence" standard better accommodates society's interest in the finality of criminal judgments, without unduly undermining the incentives habeas corpus review gives prosecutorial officials to comply diligently with constitutional restrictions at trial or substantially increasing the

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rested not on any doubts about the constitutionality of a rule finding such evidence relevant, for the Court stated that it was not "necessary * * * to express an opinion on the probative value for impeachment purposes of petitioners' silence." 426 U.S. at 618 n.8. Rather, the *Doyle* Court rested its holding squarely on the notion that the implicit "assurance [conveyed by the *Miranda* warnings] that silence will carry no penalty * * * [made it] fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618; see *Wainwright* v. *Greenfield*, 474 U.S. 284, 294 (1986) ("the ambiguity of the defendants' silence in *Doyle* merely added weight to the Court's principal rationale, which rested on the implied assurance contained in the *Miranda* warning"); *Greer* v. *Miller*, 483 U.S. at 763.

The Court's subsequent holdings have made it clear that the relief granted in *Doyle* rests not on doubts about the probative value of evidence of silence, but solely on the unfairness of using such evidence when the silence is induced by government action. See *Fletcher* v. *Weir*, 455 U.S. 603, 605-607 (1982) (allowing use of post-arrest silence in case where defendant did not receive *Miranda* warnings); *Jenkins* v. *Anderson*, 447 U.S. 231, 238-240 (1980) (allowing use of pre-arrest silence).

risk that a federal court will uphold an unjust conviction."[11] Moreover, because federal courts already apply the standard to violations of federal rules and statutes that occur in federal trials, see, *e.g.*, *United States* v. *Lane*, 474 U.S. 438 (1986), courts can turn to an existing body of law for aid in applying that standard in particular cases.

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[11] This case does not require the Court to announce a general rule regarding the standard for deciding whether to overturn convictions on collateral review. As the Seventh Circuit and petitioner note, Pet. App. 13d; Pet. Br. 49, this Court on occasion has applied the *Chapman* standard to certain claims it has considered on collateral review. In addition to the cases cited by the Seventh Circuit and petitioner, we note *Anderson* v. *Nelson*, 390 U.S. 523 (1968) (per curiam), in which this Court applied the *Chapman* standard to overturn a state-court conviction on collateral review based upon "extensive" improper comment on the defendant's failure to testify at trial. *Id.* at 525. *Anderson* was a summary reversal without benefit of argument; the question whether the *Chapman* standard or some other standard should apply to collateral review of the defendant's claim was not addressed in the certiorari papers before the Court. Moreover, in none of the cited cases has the Court itself directly considered the question presented here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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